Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-988

HERMAN H. KRAUSE, ET AL,
Petitioners,

Versus

CITY OF BRUNSWICK, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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Petitioners, Herman H. Krause, et al, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on September 27, 1979.

OPINIONS BELOW

(1) The opinion of the Supreme Court of Georgia (Appendix p. A-1) has not been reported. (2) The opinion of the lower court sustained (Appendix p. A-2). (3) The Southeastern citation is not yet available.

JURISDICTION

The opinion and judgment of the Supreme Court of Georgia were issued on September 27, 1979. The jurisdiction of this Court is invoked under the Rivers and Harbours Act of 1899, as amended, 33 U.S.C. Sections 401, 403, 407 and 491 (as well as 28 U.S.C., Section 125 (3)).

QUESTIONS PRESENTED

The causeway from the mainland to St. Simons Island, Georgia was built across the salt water, tidal marshes and several rivers. The causeway is about five miles long. The question is who owns the marshes and the tidal basin located between the mainland and St. Simons Island.

The evidence was without contradiction that the State of Georgia had never conveyed to anyone the area of the marshes upon which the causeway was built. Petitioners claimed that the State of Georgia owned the marshes and therefore owned the causeway. The lower courts held that the title to this portion of the marshes was owned "by the County of Glynn or the City of Brunswick or both".

The causeway crosses the Intra Coastal Waterway at two points.

STATEMENT OF THE CASE

1.

St. Simons Island Causeway was originally constructed in 1923 from US 17 Highway on the mainland to St. Simons Island, Georgia. In 1949, the causeway was reconstructed at a cost of two and one-half million dollars and a county bond issue was sold to pay for the construction. A toll was placed on the causeway to generate revenues for the payment of the principal and interest due on the bonds. In February 1979, the last of the bonds and interest were paid in full. However, the County continued to collect the tolls on the causeway and is continuing to this date.

2.

Petitioners herein filed a suit for a declaratory judgment in the lower court to enjoin the collection of tolls on the grounds that neither the City of Brunswick nor the County of Glynn had any right to continue the operation of the causeway because the causeway had been built across the marshes and rivers between the mainland and St. Simons Island and because this area, upon which the causeway was built, was property belonging to the State of Georgia. The petitioners contended and the evidence showed that the State never conveyed any of the marsh lands to either the County or the City, both of whom claim they owned a part of the causeway and both of whom claim they are entitled to part of the proceeds from the collection of tolls.

3.

Petitioners contended that since the State owned the marshes and had not conveyed title to either County or City, therefore the State owned the causeway built upon the marshes. On Motions for Summary Judgment, the trial court held that either the County or City or both owned the causeway. Thus the lower court excluded the State of Georgia as the owner. The Supreme Court of Georgia upheld the lower court in a per curiam decision.

4.

The State of Georgia intervened in opposition to the Petitioners even though the Attorney General of the State of Georgia had previously rendered an opinion that the State of Georgia owned all the salt water marshes along the Georgia coast, consisting of some 400,000 acres.

REASONS FOR GRANTING WRIT OF CERTIORARI

1.

The decision of the Georgia Supreme Court let stand the decision of the lower court which placed title to the salt water marshes in the local government. Such a ruling is not in accord with applicable decisions of this Court where this Court has held that the title to tide waters rest in the appropriate state, as follows:

(a) In the case of *Charles W. Shively vs. John O.A. Bowlby, et al*, 152 U.S. 1, held as follows: §"Lands under tide waters are vested in the sovereign for the benefit of the whole people." (Headnote 2) § Upon the American Revolution, lands under tide water, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States." (Headnotes 2 and 3)

The *Shively* case came out of Oregon. On page two the Court discussed the proposition that the title to lands flowed by the tide were vested in the King and passed either by Grants from the King prior to the American Revolution or were vested in the original States after the American Revolution.

(b) In the case of *Borax Consolidated, Lts., et al vs. City of Los Angeles* 296 US 1, the Court held that the soils under tide water within the original states were reserved to them respectively (page 15) and that the title to the tide land in question passed to California at the time of her admission to the Union in 1850 (page 16). The *Borax* case also held that "The tide land extends to the high water mark" and "by common law the foreshore is confined to the flux and reflux

of the sea at ordinary tides. It is the land between ordinary high and low tide mark, the land over which the daily tides ebb and flow." At pages 23 and 24 as well as the footnotes thereto the Court explains the terms of "spring" tide and "neap" tide, noting from a book entitled "The Tide" written by Marmer, Associate Chief, Division of Tides and Currents, U.S. Coast and Geodetic Survey.

In the *Borax* case the Court finally held on page 27 that mean high water at any place is the average height of *all* high waters at that place over a period of considerable time. (emphasis added).

(c) In the case of *Milton A. Baer vs. Moran Brothers Company* 153 U.S. 287, Headnote 3, U.S. Supreme Court, held that: "Lands alternately covered and uncovered by the tide and between the dry upland and the navigable waters are 'tide lands' ". The *Baer* case was a case involving the mud flats lying on and adjacent to the waters of Puget Sound in the State of Washington.

The Fifth Circuit ruled on this matter in the case of *United States et al vs. Turner*, 175 F.2d. 644, THAT "Navigable waters and soils under them in Alabama belong to the State." (Headnote 1) and § § "Fact that waters flowing submerged lands of island located in body of water in Alabama that was concededly navigable waters were too shallow for actual navigation, did not preclude waters flowing the island from being navigable waters, and, hence, title to submerged lands belonged to state."

This case involved Mobile Bay and the Court made no distinction in determining navigable between the shallows and depts of navigable waters (page 648).

Georgia Supreme Court has held that the fee simple title in the foreshore in all navigable tide waters lies in the State. *State of Georgia vs. Ashmore, et al,* 236 Ga. 401, 413, 224 S.E. 2d. 334. This opinion arose out of a case involving title to the beach of St. Simons Island, Georgia which lies on the opposite side of said island from the salt water marshes in the instant case.

2.

The area involved affects the 400,000 acres, or more, along the entire coast of Georgia of over 150 miles in length, not even including the various property owners fronting on the marshes. The effect of the ruling of the Georgia Supreme Court is to apply a different law to the State of Georgia than has been applied to Oregon, California, Washington and Alabama. The Georgia decision is contrary to the decisions of this Court and this Court should take jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Moreton Rolleston, Jr., Attorney for Herman H. Krause, et al, do hereby certify that I have served all of the parties of record with the within and foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia by mailing a copy of same, by certified mail, to all counsel of record, at their correct mailing addresses, with sufficient postage affixed thereto as follows:

Eugene Highsmith
P.O. Box 997
Brunswick, Georgia 31520

J. Thomas Whelchel
Dickey, Whelchel, Miles & Brown
P.O. Box 220
Brunswick, Ga. 31520

Thomas J. Lee
Taylor, Bishop & Lee
P.O. Box 1396
Brunswick, Georgia 31520

This 26th day of December, 1979.

Moreton Rolleston, Jr.

APPENDIX I

In the Supreme Court of Georgia.
Decided: SEP 27, 1979

34920. KRAUSE et al. v. CITY OF BRUNSWICK et al.

This court has determined that this is a proper case for application of Rule 59.

Judgment affirmed. All the Justices concur, except Hall and Marshall, J.J., who dissent.

APPENDIX II

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

HERMAN H. KRAUSE, ET AL.
Plaintiffs,

Vs. CIVIL ACTION NO. 18844

CITY OF BRUNSWICK, ET AL.
Defendants.

JUDGMENT

The above styled case having come on regularly for hearing on motions for summary judgment filed by both plaintiffs and defendants, and after hearing same, and all parties having agreed that both motions for summary judgment could be heard today and the time limitations and notice requirements specified by Code 81A-156 having been expressly waived by all parties in open court

It is hereby ordered and adjudged that;

1. The motion for summary judgment filed by plaintiffs is denied

2. The motion for summary judgment filed by defendants is granted on all issues raised by the complaint as amended and the title to the Brunswick St. Simons Island Causeway or

portions thereof, as described in the plaintiff's complaint, is held by the County of Glynn or City of Brunswick or both.

So ordered this 2nd day of March, 1979.

/s/ GORDON KNOX, Jr.
Gordon Knox, Jr.
Chief Judge
Brunswick Judicial Circuit